Supreme Court, U.S.
FILED

98 795 SEP 21 1998

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No. _____

IN THE
Supreme Court of the United States

October Term, 1998

★

CALZADILLA CONSTRUCTION CORPORATION,

Petitioner

vs.

MUNICIPALITY OF VEGA BAJA,

Respondent

★

PETITION FOR WRIT OF CERTIORARI
OF PUERTO RICO CIRCUIT COURT OF APPEALS
(P.R. SUPREME COURT, CERT. DEN.)

★

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Filed on September 21, 1998

QUESTIONS PRESENTED

I- The denial of taxpayer's right to "just compensation" or refund violates the Fifth and Fourteenth Amendment, as the Puerto Rico Supreme Court declared the tax unconstitutional.

II- The denial of the Puerto Rico Supreme Court to grant review to this taxpayer violates his right to due process under the Federal Constitution.

III- Once the Puerto Rico Supreme Court resolved that the tax was unconstitutional and the Municipal Ordinance null, neither the Puerto Rico Supreme Court nor the lower Courts could refuse to reimburse the taxpayer alleging possible, although unproven, hardship to the taxing entity.

IV- A possible, though unsupported, hardship by the taxing entity (a municipality) does not constitute any basis whatsoever for a taking without any compensation under the Fifth and Fourteenth Clause of the Federal Constitution.

V- The application by the Courts of a decision declaring a tax unconstitutional cannot itself go against the same Constitution, and, thus, the Puerto Rico Supreme Court cannot violate taxpayer's right to an Equal Application of the law under the Federal Constitution, under color of "applying its decision retroactively" and creating an unreasonable classification of taxpayers.

VI- There is no reasonable basis for a decision against taxpayer under local law that can sustain the Court's denial of refund.

LIST OF PARTIES AND CORPORATIONS

The taxpayer, Calzadilla Construction Corporation, is a corporation authorized to do business in Puerto Rico that is no longer doing business and has no affiliates, parent companies nor wholly owned subsidiaries.

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No. _____

In The
Supreme Court of the United States
October Term, 1998

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CALZADILLA CONSTRUCTION CORPORATION,

Petitioner

vs.

MUNICIPALITY OF VEGA BAJA,

Respondent

★

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

★

Petitioner most respectfully prays that a writ of certiorari be issued to review judgment and opinion of the Supreme Court of the Commonwealth of Puerto Rico, entered in the procedure entitled *Calzadilla Construction Corporation* vs. *Municipality of Vega Baja*, Case Number CC 98-280, on June 24, 1998.

Filed on September 21, 1998

OPINIONS BELOW

The Order entered by the Puerto Rico Supreme Court denying review is not reported nor is there an opinion. (Appendixes A) Therefore, we submit also the Puerto Rico Circuit Court of Appeals decision (Appendix B), which review was denied.

JURISDICTION

The above mentioned Order by the Supreme Court was entered on June 24th, 1998. The jurisdiction of this Court is invoked under 28 USC 1258 which grants jurisdiction to this Court to review final decrees by the Supreme Court of the Commonwealth of Puerto Rico where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to Federal Law, and also, where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

NOTIFICATIONS MADE PURSUANT TO RULE 29.4

No notification has been made under Rule 29.4, yet an unconstitutional misapplication of the law is alleged by the taxpayer, and thus, the constitutionality of a statute may be drawn in question, and 28 U.S.C. Sec. 2403(b) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part that:

> **"No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."**

2. The Fourteenth to the United States Constitution provides in relevant part as follows:

> **"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

3. Article II, Sec. 7 of the Constitution of the Commonwealth of Puerto Rico provides in relevant part that:

> **" It is recognized as a fundamental right... the right to life, liberty and the enjoyment of property. No person shall be deprived of his liberty or property without due process of law, and no person in Puerto Rico shall be denied equal protection under the law. No laws shall be enacted that undermine contractual obligations."**

4. Article II, Sec. 9 of the Constitution of the Commonwealth of Puerto Rico provides in relevant part as follows:

> **"No private property shall be taken for public use without just compensation and in the manner prescribed by law."**

STATEMENT OF THE CASE

This case is about a construction corporation who paid excise taxes to the Municipality of Vega Baja on a construction project, as required by law. The excise taxes were declared illegal and null in 1994 because the P. R. Supreme Court deemed it to be an unconstitutional double taxation. The company requested a refund, which was denied because in a previous case the P. R. Supreme Court had decided against a similar refund for a taxpayer. The company argued that this case is distinguishable from that one because under tax doctrine, a person is required to plead **and** prove that it paid the tax and did not "pass it along" to another person. Failure to do this disqualifies such person as a "taxpayer". The Lower Courts refused to distinguish this case and the P. R. Supreme Court denied review.

The questions presented through this petition arose when the Lower Courts refused to distinguish the present case from, and therefore, misapplied the previous decision of the Puerto Rico Supreme Court which stated that although it had recently declared a Municipality Ordinance void and unconstitutional, it would "apply retroactively" the decision and allow the Municipalities to keep the monies levied illegally because, to decide otherwise **could** cause the

Municipalities economic hardship.

In applying an unconstitutional decision, as well as disallowing the distinction, the Lower Courts, and thereafter, the P. R. Supreme Court went against both the Puerto Rican and the Federal Constitutions.

The Order by the P. R. Supreme Court denying review violates the Due Process Clause of the Federal Constitution inasmuch as the Supreme Court refused to distinguish this taxpayer from the taxpayer in the previous case, in effect sustaining its erroneous and unconstitutional decision to deny refunds to **any** taxpayer in the future.

The government is, in effect. trying to protect "its own", and, moreover, no evidence is on record to sustain that, in fact, the refund, or even all refunds, would cause economic hardship to the Municipalities. This taxpayer alleged that no such hardship would inure, and even agreed to receive credit instead of an actual refund, as a good faith offer in this case.

The Federal Questions sought to be reviewed were presented to the lower court (Taxpayer's Appeal, Primarily argued at Part C, but also at Parts B and D.). The Federal Questions were not passed upon by the Circuit Court of Appeals, but were preserved and presented to the Puerto Rico Supreme Court (Petition for Certiorari, primarily at Part C, but also at Parts B, D, and E.), which Court denied review, silently rejecting the Federal Questions. Rule 14.1(g)i.

SUMMARY OF THE ARGUMENT

The taxpayer is requesting refund of taxes collected illegally by the Municipality of Vega Baja, Puerto Rico. The P. R. Supreme Court declared the municipal ordinance imposing said taxes null, illegal and unconstitutional, declaring also that it constituted an unconstitutional double taxation. Subsequently, although not complying with the tax procedure requirements of pleading and proving that it was "the taxpayer", sustaining the burden of the tax without passing it along to another, this other "taxpayer" requested refund of the same tax, but the Supreme Court decided it would apply the norm "prospectively" and disallow the claim, because of a possible hardship to the municipalities that would have to reimburse the monies collected illegally.

Taxpayer here sustains that the unconstitutional application by the lower Courts in this case of the decision to disallow refunds, and the Courts' refused to distinguish this case from that one, although this taxpayer pleaded and proved it was the "taxpayer", is a violation of the Fifth and Fourteenth Clauses of the Federal Constitution.

The misapplication of that decision and subsequent refusal by the P. R. Supreme Court to review the case constitutes an unjustified and unreasonable taking without just compensation, and in reality, without any compensation at all, and creates an unfair, unreasonable and unconstitutional classification of taxpayers, that allows a refund for the taxpayer that did not follow proper tax procedure and confiscates the monies paid by this taxpayer, who filed for its refund, properly following tax procedure and doctrine.

REASONS FOR GRANTING THE WRIT

I- The denial of taxpayer's right to "just compensation" or refund violates the Fifth and Fourteenth Amendment, as the Puerto Rico Supreme Court declared the tax unconstitutional.

It is a basic tenet of fairness, as set forth in the Fifth and Fourteenth Amendments of the Federal Constitution, that the government cannot deprive a person of his property, any kind of property, without due process. One of the fundamental principles of a "taking" is that the government must pay a "just compensation". The government cannot just take away that property, nor deny its return, stating that it will "apply prospectively" its declaration of unconstitutionality. Mullane v. Central Hanover Tr. Co. , 339 US 306 (1950); Fuentes v. Shevin, 407 US 67 (1972); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 US 601 (1975) Mitchel v. W.T.Grant., 416 US 600 (1974); Calero-Toledo v. Pearson Yatch Leasing Co., 416 US 663 (1974); Lugar v. Edmondson Oil Co., 73 L. Ed. 2d 482 (1982).

Once the Municipal Ordinance was declared **null**, the Supreme Court could not arbitrarily decide to whom the tax would be applied. It is up to the Legislative Branch, and **only** up to that branch of government, to decide through the enactment of the corresponding law, who is to be taxed and who is not. The crux of the Supreme Court's denial, and the Lower Courts following it, is that: "we do not think that a retroactive application [of the decision] furthers the purpose that the imposition of double taxation emanate from a clear and express legislative mandate". Obviously, the purpose of

the "clear and express" legislative mandate is that the tax be legal. "Splitting the baby" does not apply in this case. All taxpayers must be treated equally. The Ordinance cannot be null for some taxpayers and not for others.

II- The denial of the Puerto Rico Supreme Court to grant review to this taxpayer violates his right to due process under the Federal Constitution.

The Puerto Rico Supreme Court's refusal to review the case is an attempt to eclipse its mistake and violates the Due Process Clause of the Federal Constitution. The Supreme Court "presumed" that the tax paid was eventually recuperated by the taxpayer it denied the refund, because, according to the Court, the taxpayer would pass it on to someone else or deduct it on its tax return, therefore, 'no real harm was done'. Even though there appears to be no evidence on record to sustain that finding, and that it would, indeed, be an incorrect determination as to tax principles because if the taxpayer "passed along" the tax, he would not then qualify as a "taxpayer" and would have no right to the refund, the present case does not fall under that reasoning, as this taxpayer submitted that it did not, and could not legally "pass along" the burden of the payment of the tax. Therefore, it is even more evident that the decision was applied unconstitutionally to this taxpayer, and that his right to discuss his constitutional allegations before the Court of Highest authority was denied.

The federal question was properly presented at the lower court level, argued in briefs before the Circuit Court of Appeals, and before the P.R. Supreme Court. Bryant v. Zimmerman, 278 US 63 (1928).

III- Once the Puerto Rico Supreme Court resolved that the tax was unconstitutional and the Municipal Ordinance null, neither the Puerto Rico Supreme Court nor the lower Courts could refuse to reimburse the taxpayer alleging possible, although unproven, hardship to the taxing entity.

IV- A possible, though unsupported, hardship by the taxing entity (a municipality) does not constitute any basis whatsoever for a taking without any compensation under the Fifth and Fourteenth Clause of the Federal Constitution.

As stated, there appears to be no evidence on the record sustaining the indicated economic hardship, and, indeed, this taxpayer submitted to the Courts an analysis that proved otherwise. The procedure accepted by the PR Supreme Court to request the tax refund would have to be complied with by other taxpayers similarly situated, and at the time of the present case, there would indeed be very few of these left. A determination without any evidence on the record, of an imaginary harm, cannot be sustained under the Fifth and Fourteenth Amendments of the Constitution.

The fact that the county might not be able to recover from the taxing districts the amount of money paid to such districts would not exempt it from liability to the taxpayer from whom it wrongfully collected it. Mathews v. Rodgers, 284 US 521 (1932).

V- The application by the Courts of a decision declaring a tax unconstitutional cannot itself go against the same Constitution, and, thus, the Puerto Rico Supreme Court cannot violate taxpayer's right to an Equal Application of the law under the Federal Constitution, under color of "applying its decision retroactively" and creating an unreasonable classification of taxpayers.

The application of the P. R. Supreme Court of its previous decisions cannot violate taxpayer's rights under the Constitution. Not only does the Court have the duty to follow the constitutional clauses, but also their spirit and intention. It cannot declare a law void, and then refuse to apply its own decision. In doing so, the Supreme Court created two separate classifications of taxpayers, i.e., those who did not comply with the law and did not pay the tax, and those who followed the proper tax procedure, and paid the tax and requested a refund. The Court is in effect "splitting the baby" and sending a dangerous message at the same time. It is saying to those who disobeyed the law and did not pay: "Don't worry"; and to those law-abiding taxpayers: "Tough luck." This reasoning cannot stand under our Constitution. Taxpayer classifications have to be legal and reasonable. This one is not.

"Our whole system of law is predicated on the general, fundamental principle of equality of application of the law." Bowling v. Sharpe 347 US 497, 499-500 (1954). Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Due

process is not only a procedural safeguard, but is substantive in nature. See: Poe v. Ulman, 367 US 497, at 540 (1961) and Hurtado v. California, 110 US 516, 532 (1884). Also see: Brown v. Bd. of Education, 347 US 483 (1954).

Although the Supreme Court states that it is merely deciding whether to apply its decision retroactively or prospectively, and that such a decision is constitutional, this is not the case here. The Ordinance was declared null and void and the tax was levied against the constitutional requirement that double taxation be stated clearly and expressly. (See also, Puerto Rico Civil Code, 1930, Art. 3) This is not, as the Court states a "doctrine" that it has set forth from that date, but a declaration of unconstitutionality of a tax. Having declared so, the tax laws allow for a refund of any amount wrongly paid, as long as the person qualifies as a "taxpayer" and follows the proper procedure. What is null cannot be made right or ratified in any way because it never existed. It is even more inconceivable that it be declared null and void for some taxpayers and the illegal tax be permitted against others.

Lastly, the Court tries to justify the imposition by stating that factors such as the law's purpose or usage, or the effect of the new rule on the administration of justice, or even social convenience, can provide the basis for the decision whether to apply a law retroactively or not. Notwithstanding that this reasoning cannot be validly applied to an unconstitutional Ordinance, none of the reasons stated appear in this case. It is of utmost importance that the taxpayers' rights against illegal impositions of tax be protected. This is as valid a justification as "social convenience", and indeed it in itself constitutes a very powerful "social convenience". The same can be said for the

rule's "furthering of justice".

The Supreme Court does more harm than justice. It attempts against valid tax procedure; it attempts against the taxpayers' trust in the system and, indeed, in the tax laws themselves; it attempts against the Legislature's valid exercise of its Constitutional powers; and it attempts against the Legislature's express direction that there would be no tax before the one approved in 1992. Lastly, it attempts against the clear mandates of the Federal Constitution under the Fifth and Fourteenth Amendments.

The reasonableness of a statute is determined by taking into consideration the public interest promoted vis a vis the magnitude of the damage caused by extending a retroactive application to that law. Home Building & Loan Association v. Blaisdell, 290 US 398. Only valid and superior justification can override the constitutional protection to contractual relations and the social stability afforded by them. El Paso v. Simmons, 379 US 497. In the final analysis, it must be remembered that tax statutes must not be extended by implication beyond the clear impact of the language used, ..., that they must be construed most strongly against the government and in favor of the taxpayer, ..., and that they must be given a practical construction as an ordinary person reading them would understand. American Cablevision of Rochester v. Jacobs, 474 NYS 2d 653 (1984). Any act contrary to law is null, unless declared valid **by law**. P. R. Civil Code, 1930, Art. 4.

In any case, **it is a function of the Legislative Branch** to establish separate classes of taxpayers, having first established public policy and determined that the classification would reasonably further the legislative

purpose and could be justified under that criteria. Rapid Transit Corp. v. New York, 303 US 573 (1937). When the P. R. Legislature approve an excise tax for the municipalities in 1992 it did not make that tax retroactive, and expressly refused efforts by the municipalities to do so. The Legislature specifically refrained from ratifying the unconstitutional ordinances. The legislative message is clear, and the Supreme Court cannot usurp the Legislative functions or abrogate this power, but must limit its intervention to judicial interpretation of the law. The Court cannot add by implication what clearly was not intended by the Legislator. Partido Popular v. Junta, 63 DPR 296 (1944). It cannot modify, amend o alter the law through judicial legislation under the pretext of statutory interpretation, nor try to correct alleged deficiencies. Martinez v. Junta, 43 DPR 413 (1932); P.R. Racing v. Commission, 38 DPR 280; The Texas Co. v. Tesorero, 50 DPR 432 (1936).

VI- There is no reasonable basis for a decision against taxpayer under local law that can sustain the Court's denial of refund.

The P. R. Supreme Court gives an unwarranted construction to a previous Supreme Court decision declaring the Municipal Ordinance unconstitutional. In fact, this constitutes a misreading and incorrect application of both the Constitution of the Commonwealth of Puerto Rico and the Constitution of the United States. Taxpayer proposes that remedies at law are not adequate, and indeed, the Court affords no state remedy no sustain its denial. Non-federal ground "without any fair or substantial" support does not defeat federal jurisdiction. NAACP v. Ala. , 357 US 449

(1958). No clear state ground appears from the face of the opinion. Michigan v. Long , 463 US 1032 (1983). State's refusal to entertain the federal claim violates the Supremacy Clause. State must enforce the U.S. Constitution. Howlett v. Rose, 496 US 356 (1990). This is not a case were deference would be proper in state tax matters, but a petition of review of a decision unconstitutionally applying a declaration of unconstitutionality of a statute (municipal ordinance).

This Honorable Court's intervention would not constitute an intrusion into local matters. Quite to the contrary, this Honorable Court's intervention is necessary to protect this taxpayer's federal rights, as stated. Furthermore, taxpayer's position is consistent with the doctrine of restraint of the use of the declaratory judgment procedure in tax cases. Taxpayer's use of the tax procedure must not be punished, rewarding the taxpayer who did not pay the tax. As it is, the P. R. Supreme Court should have denied the original case which declared the tax unconstitutional because the taxpayer should have followed the tax procedure, and had indeed, a remedy at law to vindicate the rights alleged. It should have also required the "taxpayer" in the case deciding whether to apply the first decision "retroactively", or not to allege and demonstrate that he suffered the burden of paying the tax and didn't pass along the tax to someone else. These are tax litigation requirements that are almost universally consistent in their application. The P. R. Supreme Court did not require in either of these cases that the "taxpayers" follow the law and the tax procedures and requirements.

In the case at bar, the P. R. Supreme Court was presented with a tax analysis of these cases, and confronted with the Court's misapplication of the tax doctrine and both

local and Federal Constitutions. Our petition was denied.

CONCLUSION

Taxpayer requests that this Honorable Supreme Court order the Municipality to properly refund the tax illegally collected in this case along with legal interest and the expenses and legal fees related to the proceeding.

Respectfully Submitted.

AMANDA M. ACEVEDO-RHODES

LUZ IVETTE RIVERA

CERTIFICATION

The Appendix herein submitted is a translation admitted to be correct by the counsel of record, as the original documents: Judgments and Notices from the P.R. Supreme Court and the Circuit Court of Appeals, Writ for Petition of Certiorari filed before the P.R. Supreme Court, and the referenced case of Rexach Construction Corp. vs. Municipio de Aguadilla, opinion of December 6, 1996, 96 JTS 158, are in the Spanish language.

Commonwealth of Puerto Rico
In the Puerto Rico Supreme Court
Circuit Court of Appeals
Regional Circuit II- Bayamon

United States of America
Case No. KLAN 9700984
The President of the United States of America
Commonwealth of Puerto Rico
About: Civil Appeal

Calzadilla Construction Corporation
vs.
Vega Baja Municipality
* *

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NOTICE OF JUDGMENT

The undersigned Clerk notifies you that this Court passed judgment in the reference case on the date of March 30, 1998, which has been duly entered and registered, where you can know in detail the terms of same.

And being or representing the party affected by the judgment, of which you may interpose a writ for appeal, I address to you this notice, having entered a copy of same on April 6, 1998.

Bayamon General Clerk: PO Box 600619 Bayamon
Jose L Gandara Sanchez, Esq.: 63 Fortaleza Street, Old San Juan

San Juan, Puerto Rico, April 6 1998

A-2

Aida Ileana Oquendo Gralau

Clerk
(signed illegibly)

By: Evelyn Mercado Santiago

Auxilar Secretary- I

Commonwealth of Puerto Rico
In the Circuit Court of Appeals
Regional Circuit of Bayamon, Panel I

Calzadilla Construction Corporation Plaintiff-Appellant	*	Appeal from the Court of First Instance, Superior Part of Bayamón No. KLAN 97-00984
vs.	*	
Vega Baja Municipality, et als, Defendant-Appellee	*	Refund of Excise Tax, Declaratory Judgment and Mandamus CV. #: DCO 96-0001 (501)

Panel integrated by its president, the Judge Sanchez Martinez, and the Judges Bronco Oliveras and Urgell Cuebas.

Bronco Oliveras, Deposing Judge.

JUDGMENT

San Juan, Puerto Rico, March 30 1998.

In the present appeal, review is sought from judgment entered by the Court of First Instance, Superior Part of Bayamon, that denied a suit presented by the appellant against the Municipality of Vega Baja (Municipality) wherein appellant claimed refund of certain amount of construction excise taxes based on the opinion of the Supreme Court in Las Piedras Constr. Corp. v. Mun, de Dorado, 134 D.P.R. __, 94 JTS 3.

The Appealed Court based its decision in the Rexach Const. Co. vs. Aguadilla Municipality, 142 DPR __ (1996), 96 JTS 158, in which it was clarified that the ruling in Las Piedras Const. Corp. cited above, was not applied retroactively but prospectively from the date it was resolved on, or January 28

1994. The facts of the referenced case go back to 1991.

Understanding that the mistake alleged was not committed and being our opinion that this case presents a similar controversy to that resolved by the Supreme Court in Rexach Const. Co. vs. Aguadilla Municipality, supra, we confirm the appealed sentence.

I

The Road Authority contracted with the appellant the construction of a stretch of the De Diego Expressway passed through the Vega Baja Municipality. The project began approximately in 1991. For this reason the Municipality billed Calzadilla, the appellant, an amount of money for the construction excise tax covering authorized by Ordinance No. 25, Series 1990-91. Billing total was a hundred thirty-two thousand dollars ($132,000), of which the appellant paid eighty-two thousand dollars ($82,000). It should be noted that Calzadilla was also obligated to pay municipal license taxes ("patentes") for the same economic activity.

On February 12 1996, appellant sued the Municipality claiming the refund of the amount paid regarding the construction excise tax. It used as a rule the case of Las Piedras Const. Corp. vs. Dorado Municipality ,supra, wherein the Superior Court declared illegal the collection of such excise taxes caused by submitting a single economic activity to double taxation, for which municipal taxes ("patentes") were already paid, and because there was no clear and express disposition under the Municipal License Tax ("Patente") Law to authorize it. Since these taxes were illegal, the municipalities were prohibited from collecting them from the contractors.

While the reference case was being considered by the appealed court, the Supreme Court resolved Rexach Const. Co. vs. Aguadilla Municipality, supra, in which it was expressed that the application of the case of Las Piedras Const. Corp would be prospective from the day it was resolved, January 28 1994. Because of this, all bills and payments before that date were implicitly sustained.

In accordance with this decision, the Municipality requested that this lawsuit be dismissed. The Court of First Instance did the same, applying the case cited to the facts of this case. Having paid the excise tax claimed before January 28 1994, the court a quo understood that plaintiff's claim could not prosper.

Unsatisfied with such ruling, appellant comes before us alleging that the appealed court erred when interpreting incorrectly the effect of the Rexach Const. Co., supra, on the facts of this case, so a refund for the entire amount paid as construction excise tax must be granted.

II

This controversy makes us consider a trilogy of recent cases from to our Supreme Court that directly incide, and up to certain point resolve, appellant's contention. Let's see.

The first case we will make reference to is Las Piedras Const. Corp. vs. Dorado Municipality, supra, in which the validity of the practice of the municipalities to levy construction excise taxes on the total value of the project when at the same time they required the payment of a municipal license tax ("patente") on the same item. This provoked a double taxation on the same economic activity. When faced with such controversy, the Superior Court resolved that municipalities lacked the power to impose a double taxation, unless the Legislative Assembly delegated that faculty to them. When analyzing the Municipal license Tax (" Patente") Law, it concluded that because a clear and explicit expression by the Legislature to this effect did not exist, the municipalities are obstructed from levying same, and therefore declared the excise taxes illegal.

After said case the Supreme Court in Nogama Construction Corp. vs. Aibonito Municipality 136 DPR___ (1994), 94 JTS 73, confirmed the opinion of the court in Las Piedras Const. Corp., declaring that Municipality of Aibonito's construction excise tax was illegal and upheld its previous

decision. Notwithstanding, it was not resolved whether these rulings were to be applied retroactively, and if so, until when.

As a result of both opinions, various cases proliferated regarding companies that, having paid the municipal excise construction tax before 1994, requested a refund of the amount paid because it was collected illegally. In the case of Rexach Const. Co. vs. Aguadilla Municipality, supra, the Supreme Court limited the application of the case of Las Piedras Const. Corp. to situations occurring after January 28 1994.

If we apply to the three opinions to the case at bar, we would have to arrive at the same result as in Rexach Const. Co.. The appellant contracted with the Road Authority for the construction of an additional section of the De Diego Expressway, which crosses through the Municipality. The construction project began approximately in 1991. The Municipality billed Calzadilla an amount of money corresponding to the construction tax authorized under a Municipal Ordinance, of which the appellant paid part in 1992.

It was not until January of 1996, when Calzadilla claimed before the courts the refund of the payment, which had already had been declared illegal two years before by Las Piedras Const. Corp.. The appellant party, in their brief, tried to persuade us, arguing that differently from the Rexach Const. Co. case, in which allegedly the tax was not paid, Calzadilla did. Reason does not assist him. From a simple reading of Rexach Const. Co. the Supreme Court points out that Rexach Const. Co. requested the refund of the amount paid, that was denied by the Municipality. It should be noted that in its brief, the Municipality acknowledges that they have now no legal authority to collect the rest of the tax in controversy. Because of this, the appellant is free to pay not the amount.

To conclude, we don't find a differentiating factor between Rexach Const. Co. and the instance case. This being so, we resolve that the Court of First Instance decided the controversy correctly, using Rexach Const. Co..

III

Based on the reasoning previously expressed, the judgment appealed is confirmed.

Agreed to by the Court and certified by the General Clerk.

(signed illegibly)
Aida Ileana Oquendo Graulau
General Clerk

COMMONWEALTH OF PUERTO RICO
IN THE PUERTO RICO SUPREME COURT

CALZADILLA CONSTRUCTION CORPORATION Petitioner vs. MUNICIPALITY OF VEGA BAJA Respondent	Motion for review from the Superior Court, Bayamón Part Civil Action DCO-96-0001 (501) KLAN 97-00984

No. CC 98-280
PETITION FOR CERTIORARI

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In San Juan, Puerto Rico
On this April 15th, 1998

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE COURT:

Comes now petitioner, through the undersigned attorneys and very respectfully STATES, ALLEGES AND PREYS:

I. JURISDICTION OF THE COURT

This Honorable Court is authorized by law to entertain this case and adjudge the validity of the claims presented by the appearing party, by virtue of Article V of the Constitution of the Commonwealth of Puerto Rico; of Article 3.002 of the Judiciary Act of Puerto Rico, Act Number 1 of July 28, 1994, as amended, of Rule 20 of the Rules of the Supreme Court and by the provisions of Rule 53.3 of the Rules of Civil Procedure in force.

II. JURISDICTIONAL BASIS

The Supreme Court will review through Certiorari judgments issued by the Circuit Court of Appeals. The writ at hand is being filed within the jurisdictional term, to enable this Honorable Court to entertain the case. This case is about an application for refund of excise taxes that was denied by the

Municipality of Vega Baja. The lower court, Bayamón Part, entertained the matter, entering judgment against the taxpayer, who appealed to the Circuit Court of Appeals. The taxpayer now resorts before this Court from the judgement entered by the Circuit Court of Appeals, pleading for the remedy applicable in law.

III. RESORTED JUDGEMENT

Judgment passed on March 30, 1998 by the Circuit Court of Appeals, Bayamón Regional District, Panel I, Panel integrated by its President, Judge Sánchez Martínez and judges (Broco Oliveras, Reporting Judge), Calzadilla Construction Corporation vs. Municipality of Vega Baja, Case No. KLAN-97-00984, entered on April 6, 1998 and received by us on April 8, 1998. From this determination we resort.

IV. STATEMENT OF FACTS

On January 7, 1996 the reference taxpayer filed this complaint (Annex 1), requesting the refund of excise taxes paid to the Municipality of Vega Baja. The Municipality timely answered the complaint and counterclaimed (Annex 2). Plaintiff answered the counterclaim (Annex 3) and, afterwards requested dismissal of the counterclaim (Annex 4). The Municipality opposed the dismissal (Annex 5) and plaintiff replied to such opposition (Annex 6) The lower court passed partial judgment dismissing the counterclaim (Annex 7). After resolving the jurisdictional question (Annex 8), the Municipality filed its Legal Brief in support of its position (Annex 9). Afterwards, taxpayer filed also (Annex 10). On June 13, 1997 the lower court entered judgment in the case (Annex 11). After requesting the extension of time (Annex 12), which we deemed interrupted by the Informative Motion Announcing Vacation (Annex 13), taxpayer filed a Request for Reconsideration (Annex 14). On August 26, 1997, received on September 3, 1997, the lower court denied the Request for Reconsideration (Annex 15). Taxpayer filed an appeal before the Circuit Court

of Appeals (Annex 17)[1] and the Municipality timely filed Appellee's brief (Annex 18). The Circuit Court of Appeals passed judgment on March 30, 1998, entered on April 6, 1998 and received by us on April 8, 1998 (Annex 19).

For purposes of the discussion of the case and its subsequent resolution, the taxpayer accepted the facts presented in the Legal Brief filed before the lower court by the Municipality of Vega Baja, since said motion was filed first. The controversy is really one of law, about the properness of the return or refund of the construction excise tax by the Municipality of Vega Baja, which imposition has already being declared illegal by the Puerto Rico Supreme Court in the case of Las Piedras Construction vs. Municipality of Dorado, opinion of January 28, 1994, 94 JTS 3.

The brief factual exposition made by the Municipality, which we reproduce hereinafter, is sufficient to solve the controversy.

> "Plaintiff Calzadilla Construction is or was[2] a corporation engaged in construction, to which was granted the bid of the Road Authority for the construction of a part of the De Diego Expressway. The total value of that contract was $16,600,000.00 and the work started on March, 1991.
>
> The Municipality of Vega Baja sent Calzadilla an invoice for the total of the construction excise tax, applicable to this work, pursuant to Ordinance No. 25, Series 1990-91.[3] ...The excise tax amounted to $132,800...
>
> Upon this same volume of business, this is,

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[1]Annexes are not included to avoid over volume, as it would be repetitive.

[2]Calzadilla Construction ceased operations on December, 1994.

[3] See Annex 16.

related to the contract with the Authority, Calzadilla had also to pay to the Municipality the municipal license ("patente") tax."

The Municipality of Vega Baja accepts that the imposition and collection of the construction excise tax are illegal. The procedure utilized and the period of time within which the return or refund was requested were recognized correct by the lower court, and also sustained in what is pertinent by the Circuit Court of Appeals. The only objection or impediment for the refund, according to the lower court and the Circuit Court of Appeals is the case of Rexach Construction Corp., vs. Municipality of Aguadilla, opinion of December 6, 1996, 96 JTS 158. Neither the lower court, nor the Circuit Court of Appeals distinguished the situation in Rexach from the present one, even though they are, in fact, distinguishable, since in Rexach it was not alleged, nor proved that said enterprise bore the burden of the payment while in the present case this requirement was complied with. The Circuit Court of Appeals erred in its interpretation of the concept of "bearing the burden of the tax", stating that in Rexach, "the Supreme Court itself indicated that Rexach requested the refund of what was paid, petition that was denied by the Municipality." That is not the concept of sustaining the burden of payment of the tax, as we have discussed throughout this case, which doctrine is amply known in the tax field. This fact, not alleging nor demonstrating having suffered the burden of the tax, makes this case clearly distinguishable from the Rexach case, distinction that, in our opinion, allows granting the refund to Calzadilla. This writ is predicated in such error.

V. CITING OF ERROR

FIRST AND ONLY ERROR: THE LOWER COURT AND THE CIRCUIT COURT OF APPEALS ERRED IN THEIR INTERPRETATION OF THE EFFECT OF THE REXACH CASE AND ITS APPLICATION TO THIS TAXPAYER'S SITUATION

VI. DISCUSSION OF ERROR

FIRST AND ONLY ERROR: THE LOWER COURT AND THE CIRCUIT COURT OF APPEALS ERRED ON THEIR INTERPRETATION OF THE EFFECT OF THE REXACH CASE AND ITS APPLICATION TO THIS TAXPAYER'S SITUATION

A. Origin of Proceedings

Notwithstanding the foregoing, we deem proper to start from the beginning. This matter must be seen from the point of view of a case that deals with taxes paid, which Calzadilla Construction is trying to recover. Since the case deals with a construction excise tax imposed without a procedure to claim refund of its payment, for whatever reason requested, courts had been forced to intervene in determining which is the correct method to claim refund of the excise tax. There should be no doubt, however, that there must be some manner of recovering the tax. As an analogy, and taken as a whole, the Law of Autonomous Municipalities, Act 81 of August 30, 1991, and related amendments, authorizes the recovery of different kinds of taxes paid: personal and real property taxes (21 LPRA 5205), and also the municipal license taxes (21 LPRA 651 §). Since it was recently enacted, that special law does not analyze tax law requirements, nevertheless such tax principles are incorporated within it. Thus, in a parallel manner, it is the lower court, Superior Part, the court with jurisdiction over this matter, pursuant not only to the provisions of 21 LPRA 4702 but also to the particular ones at 21 LPRA 651o (municipal license tax) or at 21 LPRA 5091 (property taxes). The Supreme Court has analyzed this as follows:

> "The Superior Court will subsequently substitute the Tax Court that worked separately, and which is abrogated by this Act, as the proper court to hear all court appeals of tax decisions, resolutions and orders. In this manner, sections 1, 2, and 7 to 21 of Act No. 328

of May 13, 1949 are repealed, as to the matters related to administration and creation of such court. However, the procedures applicable to such cases, and the requirements for the court to review, in the sense that a bond should be posted and the tax must be paid in full before filing an appeal before the Supreme court, are presently in full force and effect ...

In summary: the jurisdiction or venue in tax matters that was granted by the Legislature to the Superior Court in 1952 is identical to the one that the former Tax Court created by Act 328 of 1949 had. All the conditions established by government while granting permission to be sued in tax claims stayed in effect after the approval of the Judiciary Act of 1952. Now, which are the provisions governing tax litigation dealing with the propriety of the imposition and collection of excise taxes?

Until the Tax Court was created by virtue of Act No. 169 of May 15, 1943 (Laws, p. 601), the only manner to initiate an excise tax claim was paying them under protest and suing the Treasurer for their refund. In effect, pursuant to Act No. 8 of April 19, 1927 (Laws, p. 123) and of Act 17 of November 21, 1941 (Laws, Extraordinary session, p.55), if the taxpayer believed that he did not owe taxes, but wanted to contest this matter, he was forced to pay the taxes under protest and state on the back of the receipt the reasons for his objection and challenge. Within a period of 30 days from payment, he could file a complaint against the Treasurer of Puerto Rico in the applicable District Court in order to obtain the refund of the objected amount. The complaint could not be filed for an amount or on grounds different than those stated in the objection at the time of payment. See Monge v. Tribunal de Contribuciones, 68 DPR 639 (1948).

...

In 1949 the Legislature abolished the ... payment under protest and claim for refund... However, it left in effect, exclusively, the second existing procedure to

litigate excise taxes, incorporating it to a general law that grants the right to obtain refund or credit, with interest, of any type of taxes (including excise taxes) paid or collected illegally or unduly, or in excess of the amounts due. We refer to Act 232 of May 10, 1949 (Laws, p.721) which is in effect today. It is well known that it grants taxpayer a period of four years from date of payment of the excise taxes to file before the Secretary of the Treasury a request for refund and if such is denied totally or partially" the taxpayer can appeal from such denial before the Puerto Rico Tax Court (now Superior Court), in the manner, within the period of time and in compliance with law requirements." 13 LPRA sec 261.

[The Law] fixes a uniform period of 30 days from date of notice made by the Secretary of the Treasurer to the appellant individual or entity to file any complaint before the Tax Court (now the Superior Court)... The taxpayer must always pay the excise taxes prior to commencing litigation.

It is worth to point out that since 1945 the law only allowed the right to file an appeal against a refusal to refund excise taxes to the person or entity that has really suffered the burden of payment of the taxes, and "a pleading to this effect and timely proof of this, shall be considered jurisdictional requirements." Act No. 137 of May 9, 1945 (Laws, p. 463) established said conditions specifically for excise taxes or license taxes refunds. See Standard Comm. Tob. Co., Inc. vs. Tribunal de Contribuciones, 71 DPR 749 (1950)...The origin of these "jurisdictional requirements" and their current enforcement demonstrate that excise taxes must be paid before the litigation can commence, regardless of whether they are actually owed.

In all cases in which a taxpayer is allowed to litigate a tax imposition without paying the tax in advance, the Puerto Rico Legislature has adopted

conditions to guarantee payment of the tax and to ascertain the efficient collection of taxes. The Government has always tried to avoid tax litigation becoming an obstacle precluding collection of tax revenues which are necessary for its operations. Regarding income taxes, normally the posting of a bond is requested to cover the tax deficiency. If a judgment issued by the Superior Court determining an income tax deficiency is appealed, usually payment of the total amount of the deficiency is required as a condition precedent to the Supreme Court hearing the appeal in its merits. 13 LPRA sec. 3272. Regarding property taxes, acquiesced amounts must be paid and, furthermore, there is a preferential lien on property on behalf of the government. Regarding the estate and gift taxes, a preferential lien is also established and, in addition, it is forbidden, except for the purpose of generating enough funds for the payment of taxes, any alienation of the estate property, until such time all taxes are duly satisfied. Observe that in cases related to excise taxes the law does not require the posting of a bond to initiate litigation before the Superior Court. Neither does it impose other conditions in order to commence litigation, which may guarantee the efficient and orderly collection of these taxes. It is logical, then, that in these cases the only way to appeal is through the refund process.

...

There is no provision in the law that may allow an exception to be established in cases in which it is alleged that the articles subject to the excise tax are exempt from taxation. In Cafeteros de Puerto Rico v. Tesorero, 74 DPR 752 (1953), we ruled that the proper remedy to obtain a judicial ruling regarding imposition and collection of certain excise taxes was the payment of the tax, followed by a request for refund, although the taxpayer alleged that it was not a taxpayer subject to the provisions of the law. We now must reiterate what was stated there "...every claim about the illegality of a tax includes a pleading that, in relation to certain amounts or with respect to certain items, at least, claimant is not

a taxpayer. Every claim for an exemption, for instance, involves a contention that some law is inapplicable to a plaintiff." (Page 765) There is nothing strange in this. In fact, in Puerto Rico the refund procedure has always being used in cases in which the taxpayer holds that no excise taxes are owéd because of an exemption exists. See Central Coloso vs. Tribunal de Contribuciones y Sucesión Serrallés, 71 DPR 471 (1950); Cervecería India, Inc. vs. Tribunal de Contribuciones, 71 DPR 496 (1950); Descartes vs. Tribunal de Contribuciones y Cervecería India, Inc., 71 DPR 512 (1950); Pedro A. Pizá, Inc. vs. Tribunal de contribuciones, 72 DPR 320 (1951); Sucn. Serrallés vs. Tribunal de Contribuciones, 74 DPR 19 (1952); Fajardo Sugar Company vs. Secretario de Hacienda, 76 DPR 856 90 (1955); and Capó vs. Tribunal de Contribuciones, 78 DPR 934 (1956)." Cervecería India vs. Secretario de Hacienda, 80 DPR 271 (1958).(Emphasis supplied)

Municipal taxes authorized by the Legislature must be consistent with the taxation imposed by the government. 21 LPRA 651b and 21 LPRA 4052. The requirement of consistency with the laws of the Commonwealth embodies the applicable principles of tax law. Municipalities cannot amplify their taxation power beyond the delegated powers. Municipalities must mirror themselves in the State government in order to limit and define their scope as taxing authorities. Municipalities can establish the same requirements imposed by government for the refund of taxes paid. In what pertains to this case, we make reference to the requirement of having suffered the burden of the tax, as previously discussed. As mentioned, in order for a taxpayer to be successful in its claim, it must be effectively pleaded and proved that it suffered the burden of the tax. Calzadilla Construction alleged having suffered the burden of the construction excise taxes and certified through a sworn statement that it suffered this cost. The Municipality of Vega Baja, and the lower court, Bayamón Part, as well, admitted that this was so, and there was never controversy over this fact. The construction project upon which taxes were paid belonged to the Road Authority, which is a

governmental entity exempt from payment of construction excise taxes. It would be illegal for Calzadilla Construction to pass on the excise tax to the Road Authority.

> "Since [he who paid] was legally responsible for the excise taxes in question, the conclusion arises that the Tax Court acted correctly in determining that it lacked jurisdiction in this case... As stated in Standard Commercial Tobacco Co. Inc. vs. Tribunal de Contribuciones, 71 DPR 749, section 4 establishes two pre-requisites for granting jurisdiction to the Tax Court: (1) the complaint must be filed by the taxpayer; (2) plaintiff must have in fact suffered the economic burden of the tax. Neither [the first] nor [the second] person fulfill these requirements. The first person was the taxpayer, but he passed the burden of the tax to the second. And, even though the second person suffered the economic burden of the tax, he was not the taxpayer.
>
> Petitioners claim that the Legislature tried to establish through Act 137 that any person suffering the burden of the excise tax, be it the taxpayer or not, could initiate a claim before the Tax Court. We rejected this argument in Standard Commercial and we reject it now again. For this argument to prosper, we would be forced to decree that, while approving this law, Legislature intended to amplify the Tax Court jurisdiction. Pursuant to this theory, if an excise tax imposed by law to the first seller was eventually declared null and void, any subsequent purchaser of all types of merchandise, regardless of how remote the purchase was, could file a claim before the Tax Court if he could only prove that the taxes were finally passed on him as part of the purchase price. We are convinced that the Legislature did not intend to broaden Tax Court jurisdiction in such manner. On the contrary, the purpose of Act 137 was to limit Tax Court jurisdiction in order to preclude unjust enrichment. The Legislature foresaw the possibility that some taxpayers might try to profit from the annulment of an excise tax years after

these same taxpayers had paid the tax imposed by virtue of such statute, passing the cost of the tax to the consumers. (*) Therefore, the Legislature closed the doors to our courts in these type of cases. (**) Only taxpayers bearing the burden of the tax, who did not transfer such burden to subsequent purchasers, would be allowed to file a claim for refund. (***)

(*) Cf. PR Tobacco Corp. vs. Buscaglia, Tes., 62 DPR 811; A. Fisher Tobacco Co. vs. Buscaglia, Tes., 65 DPR 125; R. Santaella & Bros., Inc. vs. Tribunal de Contribuciones, 66 DPR 868.

(**) Cf. Act 67, Laws of Puerto Rico, 1945 (p. 249), approved at the same time, which imposed a tax over unjust enrichment amounting to 80 percent in cases in which a plaintiff received refund of taxes which already passed on a purchaser as part of the purchase price. See also Act No. 234, Laws of Puerto Rico, 1949 ((1) pg. 729). Cf. 26 U.S.C.A., sections 700 et. seq.; United Sates vs. Kansas Flour Corp., 314 U.S. 212.

(***)It goes without saying that Legislature had the power to withdraw the consent of the sovereign to be sued for recovery of taxes paid. Gerardino vs. Tribunal de Contribuciones, 68 DPR 219, 223-24, and cases cited therein."

Pedro Pizá vs. Tribunal de Contribuciones, 72 DPR 320, 322 (1951).

Calzadilla Construction, having suffered the burden of the payment, is the taxpayer with legal standing to claim the refund. Rexach was not, according to the Supreme Court statements in that case, since Rexach neither alleged, nor proved having suffered the burden of the payment of the tax. The Supreme Court notes that, most probably, Rexach recovered such cost "passing it on", which, as we have seen, disqualifies it as a 'taxpayer' and precludes it from being entitled to the refund of the tax. Contrary to what was stated

by the Circuit Court of Appeals in its judgment, to "pay the tax" is not the same as to "suffer the burden of the tax", which difference is crucial at the time of claiming the refund. The taxpayer in this case timely appealed from the denial of refund issued by the Municipality of Vega Baja.[4]

On the other hand, the procedure used by Calzadilla Construction was sanctioned and approved by the Supreme Court in Rexach Construction Corp. vs. Municipio de Aguadilla, opinion of December 6, 1996, 96 JTS 158. Certainly there was before some confusion regarding the moment in which to appeal of a denial of refund, because generally the municipalities do not include in the ordinances specific procedures for the refund of taxes. Notwithstanding, we see how the Supreme Court validated in Rexach the request for refund and subsequent claim before the lower court. There was no objection as to the period of time, and, on the contrary, the courts exercised subject matter jurisdiction.

The not so small distinction is that in Rexach the Supreme Court stated that the taxpayer did not suffer the burden of the payment of the tax. In Rexach there were two private entities. The Supreme Court correctly concluded that the excise tax was invoiced to the owner of the construction work, thus recovered by Rexach. Rexach, then, was devoid of legal standing to claim the refund from the municipality. The Supreme Court, following the above stated doctrine, stated that it would be unfair to allow Rexach to recover the tax twice; once from the owner of the construction project, and the other from the Municipality. In the case at hand, however, the taxpayer is bona fide, suffered the payment of the tax, did not recover such cost in any manner, nor from any other party, and therefore has legal standing to claim the refund.

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[4] In fact, it appealed before, filing a writ of Mandamus to compel the Municipality to issue its formal determination, from which Calzadilla Construction could appeal, and the lower court could exercise jurisdiction. After some time, the Municipality clarified, for the record, that formal denial of the petition could be inferred from its own actions, agreeing to the continuation of the proceedings in the case.

The starting point for granting the refund is Las Piedras Construction vs. Municipio de Dorado, Opinion of January 29, 1994, 94 JTS 3. That case decreed that collection of this construction excise tax by the Municipalities was illegal, and that the municipal ordinance imposing the tax was illegal as well. The Rexach case reiterates that collection of such tax is illegal, but it is more oriented to the analysis of the properness of the refund. In Las Piedras the Supreme Court decided that this type of ordinance suffered from a serious constitutional defect, however, it had no need to analyze the aspect of the refund of the tax because the taxpayer in Las Piedras did not pay it. Contrary to the established doctrine in this area of tax law, Las Piedras used the declaratory judgment mechanism to appeal to the court. The case followed this incorrect procedural course until it reached the Supreme Court, wherein the ordinance was declared unconstitutional. Strictly speaking, under tax law, such case should have never been heard, and thus this caused that Rexach needed to bring up the refund issue. The Supreme Court denied Rexach's claim for refund while making a statement regarding the public policy applicable to cases about repayment of funds by the municipalities, and the "fairness" of the Rexach claim as well. Is upon such decision that the lower Court and the Circuit Court of Appeals base their decisions of denying the refund to Calzadilla Construction.

B. Rationale of the lower court

The decision of the lower court is based, in our opinion, in a wrong interpretation and application of Rexach, supra. To this effect, the lower court stated:

> "According to Rexach, supra, the effect of the double taxation, formerly declared impermissible in Las Piedras Construction, cannot be retroactively applied, only prospectively, from January 24, 1994, date of the Las Piedras Construction opinion, and in which date such double taxation was already approved by law. (Act 93 of November 17, 1992). Thus, the court resolved that an excise tax refund of a tax paid before January 24, 1994 cannot prosper.

> Considering that the situation in the case at hand is similar to that in Rexach, supra, since Calzadilla paid the excise tax to the Municipality prior to January 24, 1994, same result is unescapable."

We disagree with this analysis. The Rexach decision could not establish that, pursuant to Las Piedras, refund of taxes paid before Las Piedras may be returned since Las Piedras, resolved on January 28, 1994, does not make reference to payments. We have already established that there were no excise taxes paid in Las Piedras, but that Las Piedras illegally, failed to pay and appealed via the declaratory judgment proceeding. We already explained that this is not a recognized proceeding in tax law.

> "In this case the general rule applies, that in tax matters a common law remedy is not warranted, specially the injunction, if the alleged taxpayer can resort to an adequate remedy in the ordinary course of the law, as in this case, payment of the tax followed by a request for refund filed in the former Tax Court" Cafeteros de Puerto Rico vs. Tesorero, 74 DPR 752, 760 (1953) (Emphasis supplied)

In Cafeteros the Supreme Court cites Cooperativa Cosecheros de Café vs. Tesorero, 69 DPR 226 (1948), where Power Electric Co vs. Buscaglia, Tes., 63 DPR 984 (1944) is cited, indicating that the declaratory judgment remedy could not prosper, nor that of injunction, since "ordinarily, taxpayers cannot be allowed to avoid passing through the Tax Court, by using declaratory judgment proceedings.

The legal tax procedure does not contemplate the declaratory judgment mechanism to preclude collection of the taxes, to the contrary, it is censored. Cooperativa Cosecheros de Café vs. Tesorero, supra, and Power Electric Co vs. Buscaglia, Tes., supra. The reasoning is that laws are presumed constitutional, unless the Supreme Court states otherwise, therefore, they must be complied wit'ı. Payment in this case, of course, not a gift to the Municipality. Calzadilla Construction paid the excise tax and, rightfully, requested its refund following the legal tax procedure. Such has been the doctrine in this field historically.

(Compare with 13 LPRA 3424 wherein "any remedy to preclude assessment of collection of any tax" is prohibited, since the claim must be filed following the legal procedure.) Note that although Las Piedras may have filed a case utilizing the declaratory judgment procedure, Calzadilla Construction did not have reason to anticipate that same could be successful, and on the contrary, was obligated to follow the law. No other thing could be expected. Evidently, the adequate and proper legal procedure, followed in this case by Calzadilla, was to pay the excise tax imposed and request the refund.

If Las Piedras would have paid the excise tax, as it should have done under proper reading of the tax law, and as Rexach did, obviously such payment would have been previous to the decision of the case in January, 1994. The Supreme Court states in Rexach that refund of payments made before January 1994 are not allowed, as in the cases of Rexach and Calzadilla Construction, and as Las Piedras should have been. Therefore, Calzadilla Construction Corp. is in the same position as Las Piedras and in the same position as Rexach regarding date of payment of the tax. Las Piedras, Rexach and Calzadilla Construction were bound to pay the excise tax upon commencement of the construction work, all of them before January, 1994. It seems that there are two different decisions applicable to payments made before January, 1994: One, Las Piedras, states that no payment has to be made; the other, Rexach, states that payment must be made. This is, simply, not possible.

Lets analyze the situation: If the decision in Rexach is interpreted in the sense that payments before 1994[5] cannot be refunded simply because of the timing of payment by the taxpayer, the obverse side of the coin is then that the illegal imposition of the tax would prosper and the 1994 decision would be void. Moreover, it would mean that it would be proper to collect from the taxpayers that did not pay the excise tax. In other words, even though the illegality of the levy is

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[5]In reality, payments made before enactment of a law that expressly authorizes them, such as Act. No. 93 of November 17, 1992.

recognized, the practical effect would be to applaud, (since we cannot speak of "validating", because the law imposing the tax is null and void), that the municipalities go unpunished from collecting the excise tax from those who paid. Moreover, it would be perfectly legitimate that taxpayers like Las Piedras, who did not pay, would still be subject to the payment of the tax. In effect, for all practical purposes, Las Piedras would be reversed or, even worse, Las Piedras will exclusively apply to such entity, solely exempting it from payment, in open violation to the most basic principles of due process and equal protection of the law.

The lower court understood and expressed that this case is similar to Rexach. We submitted that it is also similar to Las Piedras, regarding the date in which the tax was due, constituting the reasoning in which the lower court based its judgment. For some reason, taxpayers who simply opted to follow the law have been deprived of their property unconstitutionally, while Las Piedras, who filed an illegal claim, as well as those who never paid the taxes, will be the only taxpayers that will receive the benefit of the Las Piedras decision, rewarding the procedure selected by them, which does not follow the law. Such outcome would seem to mock the legal system and the firmly established tax law principles, which are the cornerstone of our democratic governmental system. The opposite stands: taxpayers similarly situated should receive the same benefit from the determination of unconstitutionality. Constitution of the Commonwealth of Puerto Rico, Art. II, sec. 1. "The norms that nourish this Constitutional principle do not demand equal treatment for all citizens, but prohibit unjustified unequal treatment." Zachary Intr'l vs. Tribunal Superior, 104 DPR 267, 276 (1975), emphasis supplied. The distinction between this two taxpayers, i.e. those who paid and those who didn't, is not reasonable, and , in our opinion, is clearly arbitrary and unfair. In fact, there is no scheme of classifications that could exist prior to that analysis, because there was never an intention to create two different types of taxpayers.

"The Supreme Court of the United States has upheld once and once again that a state, in the exercise

of its power to tax, has ample discretion to select the subjects and object of the tax. Rapid Transit Corp. vs. New York, 303 US 573, 578 (1937); Magoun vs. Illinois Trust & Savings Bank, 170 US 283, 294 (1898); Heisler vs. Thomas Colliery, Co., 260 US 245, 255 (1922). The power to choose the subjects and object of the tax is inherent to the exercise of the power to tax in the same way that it is inherent also the power to choose which will be exempt from taxation. Neither the right to due process of law, nor the right to the equal protection of the law impose a rigid rule demanding equality in the imposition of taxes. Charmichael vs. Southern Coal Co., 301 US 495, 509 (1936); Bell's Gap R. Co. vs. Pennsylvania, 134 US 232, 237 (1890); Lawrence vs. State Tax Comm'r, 286 US 276, 284 (1932). The Legislature has vast discretion in establishing classifications. If such are reasonably related to the purpose of the legislation, the classification is justified, Rapid Transit, supra, pg. 578. Under the XIV Amendment it has been established that distinctions are not arbitrary if any situation that justifies it can be conceived. It will be presumed that the classification rests on a rational basis existing at the moment of enactment of the law. Miranda vs. Secretario de Hacienda, 77 DPR 172 (1954); Rivera vs. Corte, 62 DPR 513 (1943); Buscaglia, Tes. vs. Tribunal de Contribuciones, 64 DPR 602 (1945); Barceló & Cía. vs. Buscaglia, Tes., 67 DPR 108 (1947); Buscaglia, Tes., vs. Tribunal de Contribuciones, 69 DPR 99 (1948); U.S. Brewers Assoc. vs. Secretario de Hacienda, 109 DPR 456, 461 (1980); Rapid Transit vs. New York, supra, p. 578; Rast vs. Van Deman & Lewis Co., 240 US 342, 357 (1916); Borden's Co. vs. Baldwin, 293 US 194, 209 (1934); Metropolitan Casualty Ins. Co. vs. Brownell, 294 US 580 584 (1935).

In Rivera vs. Buscaglia, 146 F. 2d 461, 465 (1944), it was stated:

"There are few and sporadic cases in which a law has been invalidated for that reason. In the tax field,

more than in any other, the Legislature has the greatest liberty to classify.

When the legislator classifies and defines for tax purposes, he does so because he understands that not everything should be he taxed and takes into consideration the taxpayer's capacity to absorb the tax and its inflationary impact on the economy.

. . .

[It should be examined] if this classification rests on a basis, because there are differences that justify the classification, and if the classification is rationally related to the objective of promoting a permissible public purpose. If the answer is affirmative, the law shall be sustained. Miranda vs. Secretario de Hacienda, supra, p. 179."

The Supreme Court, in this classic case states that is the Legislative Assembly the one called to establish public policy regarding classifications in the imposition of taxes, whenever a classification is called for. Such is not the case here. There is no legislative expression regarding this taxation prior to 1992.

"The fact that afterwards, in 1977 the Law was amended again to grant exemption... cannot be interpreted, nor presumed, that it was done because the previous classification violated the right to equal protection of the law. The presumption of constitutionality [note omitted] accompanies a statute and can only be undermined by the most explicit demonstration that a classification constitutes a hostile and oppressive discrimination against some persons or classes. Buscaglia, Tes. vs. Tribunal de Contribuciones, 68 DPR 345, 362 (1948); Miranda vs. Secretario de Hacienda, supra, p. 181. We cannot presume, contrary to what was presumed by the lower court, that the statutes were adopted arbitrarily, without a reasonable purpose to attempt to achieve some legitimate state public policy, Allied Stores of Ohio, Inc., vs. Bowers, Tax Comm'r of Ohio, 358 US 522 (1959). The Legislature is

empowered to grant tax exemption to a product in any particular historic moment, even though it has not done so before.

Coca-Cola Bottling, supra, at page 715.

Note how the Supreme Court decided that the fact of subsequent legislation on the same matter should not be interpreted as a validation of an unconstitutional statute. Although in Coca-Cola the Court used the constitutional presumption that are laws afforded, in the present case it was already resolved that the tax imposition was unconstitutional. Having such determination of unconstitutionality, together with the clear directive from Legislature that the excise tax is authorized only after 1992, the judiciary branch cannot now interfere neither to broaden the collection nor to establish taxpayer classifications that the Legislature did not establish, nor was interested in establishing. There is no valid reasonable classification that distinguishes between taxpayers who paid the tax and those who didn't pay. The construction excise tax can be collected from neither one.

The Circuit Court of Appeals does not make a direct pronouncement regarding this argument, but goes directly to apply the Rexach case to the present situation. The argument continues to be valid, even more when considering that the lower court erroneously concluded that Rexach suffered the burden of the tax, contrary to what was stated by the Supreme Court in that case. Being such reasoning the basis for the judgment entered by the Circuit Court of Appeals, it constitutes an error that should cause the reversal of such judgment.

C. Unconstitutional taking of the property

The government cannot constitutionally deprive a person from his property without fair compensation. Art. II, sec 7 and 9 of the Constitution of the Commonwealth of Puerto Rico. This Honorable Court should note that although validly approved statutes are presumed constitutional, it is the rule that a statute that is so arbitrary that it becomes confiscatory or patently unfair, must be declared unconstitutional. What must

be evaluated in making such decision, is not the form nor definition of the statute, but, as a matter of reality, the practical effect of its application and operation. C.H. Vehicle Leasing vs. L.L.A., 107 DPR 94 (1978). We do not deny that the State is empowered to do a taking of property or particular rights. However, it is amply known that this sovereign power has two limits, to wit: (1) that the property is dedicated to a public purpose, and (2) that the person affected by the taking receives fair compensation. Opinion of the Secretary of Justice No. 32 of 1973; E.L.A. vs. Tribl. Superior, 95 DPR 339 (1967).

> "Under the Fifth and Fourteenth Amendments of the Federal Constitution, taking of property without notice or opportunity to be heard has been always considered alien to the due process of law. Mullane vs. Central Hanover Tr. Co., 339 US 306 (1950). It is not important which type of property is involved, nor that the taking is temporary. Fuentes vs. Shevin, 407 US 67 (1972); North Georgia Finishing, Inc., vs. Di-Chem, Inc., 419 US 601 (1975). (*) The statute can prevail only if it contains enough procedural guarantees to hear the affected part before the affected right is decided definitely. Mitchell vs. W. T. Grant Co., 416 US 600 (1974), or if there are extraordinary circumstances that justify it, Calero-Toledo vs. Pearson Yatch Leasing Co., 416 US 663 (1974). Ex parte conduct from a private litigator with the intention or effect of depriving a person from his property, without granting him the opportunity to be heard, are contrary to the due process of law and in some instances, base of civil responsibility. Lugar vs. Edmondson Oil Co., 73 L. Ed. 2d 482 (1982)

(*)The Federal Supreme Court itself has reiterated in North Georgia Finishing, Inc. vs. Di-Chem, Inc., 419 US 601, 608 (1975), that:

> "We are no more inclined now that we have been in the past to distinguish among different kinds of property in applying the Due Process Clause. Fuentes vs. Shevin,

407 US, at 89-90."

The retroactive application of the Las Piedras doctrine is irrelevant in this case. If the taxpayer that really suffers the burden of payment of the tax is in the same position of "tax obligation" that Las Piedras was, treatment must be the same. We have already seen that the payment obligation (although illegal) was the same for both of them. It is not reasonable that taxpayers that acted illegally and did not pay are not subject to collection of the tax and that those good payers of the tax are deprived of their refund. In that sense, if the ruling is not retroactive, (as stated by the Honorable Supreme Court), then Las Piedras is obligated to pay, with interest and penalties. In this sense, Rexach reverses Las Piedras, which doesn't seem to be the purpose of the Supreme Court decision and upon which such court did not make a specific announcement.

We most respectfully submit that a "violent disruption" would not be created in the economic system, since only an authentic taxpayer that paid and timely[6] requested the refund is entitled to repayment.[7] Anyway, the Legislative Assembly, although there was strong lobbying to this effect, did not make retroactive the law it passed in 1992, thus ratifying the illegality of the previous collections.

Therefore, according to the foregoing, it is necessary to interpret the Rexach decision within the context of that entity being devoid of the condition of "taxpayer", because it did not suffer the burden of payment of the tax. For that reason, even with all the explanations adopted by the Supreme Court in Rexach, this entity was not entitled to the refund, regardless of any other expression about the corresponding collection, and such case should not need to be reversed in order to grant

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[6] Many claims would be time-barred today.

[7] We do not know whether there was actual proof presented in the Rexach case regarding the economic impact of the refunds that were actually requested, information that we believe exists and can be gathered.

refund to the taxpayer in the case at hand. Since there was no "taxpayer", the Rexach case could have been dismissed without further pronouncements regarding the retroactive effect of the decision in Las Piedras. Calzadilla Construction Corp. is, and alleged so at the moment of filing of the claim, the taxpayer entitled to the refund. Only one difference separates Calzadilla Construction from Las Piedras: Calzadilla paid thousands of dollars and Las Piedras paid not a single cent."[8]

D. Additional considerations

Referring to the expressions of the Supreme Court, the fact that the excise tax paid is taken as a deduction on the income tax return is irrelevant to the matters discussed herein. The mechanism to compute any deduction is followed according to the generally accepted accounting principles, without this constituting, at any time, a "double benefit". Upon receiving the refund, in cases like this, the corresponding income is recorded in the taxpayer's books, informing such item and eventually paying taxes on it. Such statement by the Supreme Court, in our opinion, could be made extensive to all taxes that are paid and can be taken as a deduction (i.e., social security tax and others). According to this reasoning, no overpayment of taxes could ever be recovered through refund, conclusion this that, as known, is legally erroneous.

We understand and reiterate that the decision of the Supreme Court must be issued within the scope of situations like that of Rexach, precluding that these companies benefit unjustly. We insist that, by virtue of the tax laws, the Court did not have jurisdiction to entertain the Rexach claim, since this entity did not fulfill the requirement of having suffered the burden of payment of the excise tax. Allowing a refund in Rexach, would have caused that said enterprise could "recover" funds that didn't belong to it, since the owner of the

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[8] In fact, the construction excise taxes correspond to the same project, the De Diego Expressway (PR 22). While Las Piedras built the Dorado stretch of highway, Calzadilla Construction built the Vega Baja stretch.

construction project had already reimbursed Rexach for the taxes. The decision in Rexach does not contemplate the case herein, in which the taxpayer "paid well", claimed refund under the law and absorbed the cost. We cannot lose sight of the fact that the excise tax was illegal. Even before the Las Piedras decision stating so, the municipalities were illegally collecting a construction excise tax without having the express delegated power to do so. Even before the Supreme Court decision in Las Piedras collection of these taxes were **null.** They are not null from the date the case was decided. Collection was always null. Frankly, it is not proper to penalize the taxpayer that, bearing the cost of the tax opted for paying and claiming its refund, as it is required by law, without interrupting the governmental collection plan, and waiting until the courts decided if it was proper to authorize it, after having considered all relevant pleadings of fact and law.

On the other hand, the unfair enrichment doctrine is applicable to the Municipality , preventing that this entity may refuse to return the taxpayer to its former situation. Administrative actions are ruled, in certain circumstances, by such doctrine. Plan de Salud vs. Alcalde de Cabo Rojo, 114 DPR 697 (1983). The Supreme Court stated in that case the following:

> "Regardless of the juridical nature of the Municipality in Puerto Rico, it is clear that the obligations that it assumes are govern by principles of civil law, subject to statutes that may modify that situation.
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> Administrative contracts are normally ruled, absent a special ruling, by the general law of contracts. J.M. Auby y R. Drago, Traité de Contentieux Administratif. 2da. ed., Paris, Librairie Generale de Droit et de Jurisprudence, 1975, T.II, p. 480. This means that the unfair enrichment, among other things, its applicable to certain situations in which one of the contracting parties is a governmental entity. S. de 22 de enero de 1975, no. 8, Aranzadi, XLII Repertorio de Jurisprudencia 20; F. Garrido Falla, Administrative Law Treatiase, Madrid, Constitutional Studies Center, 1979, Vol. II, p. 12 and

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Spanish jurisprudence has applied the unfair enrichment doctrine in cases similar to this. In the judgment of January 22, 1975, supra, plaintiff build a construction work for a Municipality. The permit for the construction work was granted by the Mayor without allegedly having approval from the legislative assembly, the latter being the administrative entity with standing. Also the Municipality pleaded that difference formalities necessary for the validity of the contract were not fulfilled. The Supreme Court of Spain rule that, besides the contractual aspects, "it can not be ignore the field of administrative law of other sources from which obligations arise..." (p. 23); and even if the contract were null, the unfair enrichment receive by the Municipality imposed on it the obligation to pay the contractor "not only based on equity, but also on judicial trust..." (p. 24). (Emphasis supplied)

E. Legislative intent

"Laws will not have retroactive effect, unless they expressly state otherwise." Civil Code, 1990, Art. 3.

In Warner Lambert vs. Superior Court, 101 DPR 378 1973), the Supreme Court stated:

"Certainty about legal consequences of whatever is agreed constitutes the rational basis that gives ground to the guaranty against undermining of contractual obligations. In principle, the law shall not modify such consequences in detriment of one of the contracting parties. The parties rely in this. Stability in contractual relations is a social value that requires protection of the law. Of course, as we already stated, taking into account superior requirements of public orders, this

protection can be subordinated to the regulatory power of the government. Cf. El Paso vs. Simmons, 379 US 497, 506.

The reasonableness of the statute is determined taking into consideration mainly the important of the promoted public interest, and the scope of the undermining cost by its retroactive application. See Home Building & Loan Association vs. Blaisdell, 290 US 398; Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 701. The more serious the social malaise to be corrected by the statute, the greater the public interest involved and, thus, retroactive application is more justify.

. . .

In the same way retroactive application of statute has been found reasonable in emergency reasons arising from economic inflation or recession. The emergencies can be cost by different reasons: by a war, by natural disasters, or by economic adjustment caused by price inflation or securities depression. (Emphasis added).

None of these situations is present here. First, no retroactive law has been approved, which could require such analysis. Secondly, there are no pronouncements "based on commonly known facts and not ... a mere fiat" that established a compelling public interest that may justify such retroactive legislation, should there exists such legislation, which in fact doesn't exist.

"The laws are only superseded by subsequent laws; and it will not prevail against them lack of use, custom or practice to the contrary.

Laws can be superseded in whole or in part by other laws." Civil Code, 1930, Art. 5.

This principle is by analogy applicable to orders, resolutions, administrative rules and regulations. Piñero vs. Barreto, 68 DPR 145, (1948), Reyes vs. Torres, 65 DPR 821 (1946), as cited in Rosario Mercado vs. San Juan Racing Association, 94 DPR 634, 645 (1967). The legal text shall never be deemed modified of substituted by the regulatory text. Ex-parte Irizarry, 66 DPR 672, 676 (1946), cited in Rosario Mercado vs. San Juan Racing Association, 94 DPR 634, 642 (1967).

We have stated before that the effect of the Rexach case cannot be so broad as to create a new type of tax, nor to delegate the power to impose one, since it is the Legislature the entity which can exclusively impose taxes or delegate such power to the Municipalities. We have also stated how, although there was a strong governmental lobbying, the Legislative Assembly refused to decree in Act. 93 of November 17, 1992, that the former collection of construction excise tax would be legal.[9] Legislature did not validate municipal actions and, on the contrary it rejected them. We cannot lose sight that the political questions pertain exclusively to the Legislature and transcends the scope of judicial intervention. González Chemical, Ind. Inc. vs. Secretary of the Treasury, 86 DPR 72 (1962).

The Legislative Assembly has broad authority to define and impose taxes. The exercise of this power is undeniably subject to evaluation by the judicial branch, but judicial functions to review such determinations is extremely reduced. To justify judicial intervention a clear case of deviation from any public purpose that may reasonably be conceived, or a

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[9] There were projects of law submitted and consider which were drafted in such a manner that collection would be retroactive and valid. The rejection of these draft speaks clearly of legislative intent and public policy, upholding that the previous collection were illegally done. See Annex 1 of the Motion of Reconsideration filed by Calzadilla Construction Corp. regarding a project of law that was never enacted. What was included in that project would have allowed the municipality to collect from Las Piedras the tax it never paid.

showing of arbitrary power, rather than a demonstration of reason, must be present. Puerto Rico Telephone Company vs. Tax Court, 81 DPR 982 (1960). In agreement with these principles, it is not possible to interpret the Rexach case as having the effect of authorizing the municipality to retroactively impose the construction excise taxes, since from the record it is clear that this was rejected by Legislature more than once.

The cardinal legal principle is that courts cannot add by implication what was clearly not intended by the Legislator. Partido Popular vs. Junta, 63 DPR 296, 337 (1944). See also Puerto Rico Racing vs. Comission, 38 DPR 280, 304, wherein it was resolved that courts lack authority to modify, amend, or alter the law through judicial legislation, under pretext of a judicial interpretation of the law. Martínez vs. Junta, 43 DPR 413, 417 (1932). It is neither judicial function to correct alleged deficiencies found within legislation submitted to review. The Texas Co. vs. Treasurer, 50 DPR 432, 451 (1936). Neither can the court validate judicially a null tax imposition merely by making expression of retroactivity or prospectivity of a judicial decision. Licorería Trigo, Inc. vs. Secretary of the Treasury, 94 DPR 270,282 at note 6 (1967). Not only the municipality is precluded from imposing and collecting a tax without proper authority, but also courts are precluded to validate the null act, moreover when the basis for the nullity is its unconstitutionality. In every case, it is the recognize rule that all doubts must be decided against the government and in favor of the tax payer. In American Cablevision of Rochester vs. Jacobs, 474 NYS 2d 653 (1984) the Supreme Court of New York State resolved:

> "We do so mindful that tax statutes must not be extended by implication beyond the clear impact of the language used, ..., that they must be construed most strongly against the government and in favor of the taxpayer, ..., and that they must be given a practical construction as an ordinary person reading them would understand."

F. Defect of Nullity

"All acts exercise against law are null, except in the cases where the law itself orders its validity." Civil Code 1930, Art. 4.

The administrative error committed in the application of the law its not valid. ELA vs. Rivera, 88 DPR 196 (1963); Del Rey vs. J.A.C.L., 107 DPR 348 (1978) in fact the error should be corrected, Infante vs. Tribunal Examinador de Médicos, 84 DPR 308 (1961); Mendoza Aldarondo vs. Asociación de Empleados, 94 DPR 564 (1967).

Since the municipal ordinance cannot be established without the delegation of the faculty to levy by the Legislature, the ordinance is nonexistent. It is not an ordinance that is presumed valid until the contrary is declared. It is an act executed against the law, which causes the defect of nullity. (Civil Code, 1930, Art. 4), and as we all know, what is null cannot be ratified ever. "[I]t is known that regulations, to be valid, cannot be in conflict with the norms established by law. If they are, they are null." Descartes v. Tribunal de Contribuciones y Sucesión Serrallés, 71 DPR 471 (1950). The same occurs with the Ordinance. Even utilizing the Civil Code principles, the juridical effect of the act is null does not have that reach. We cannot lose sight of the fact that the Municipality did not have the power to levy, much less collect, the construction excise tax. Its levying and collection violated the most elementary principles of morals, public order, and due process of law, so that it could never derive the effects of an act that is merely annullable, which can, in theory, be convalidated. To the contrary, the acts executed must be restored to their original state of being. Even more so, in a meritorious case like this one. The return or delivery of what was paid by the taxpayer.

We have pointed out, supra, that the Legislature did later approve a law authorizing the imposition of construction excise taxes; Act. 93 of November 17, 1992, and did not make its effect retroactive., despite the fact that there was a strong lobbying by the municipalities to that effect. That was the clear the expression of the organism constitutionally authorized to impose taxes. Therefore, we reiterated that the case of Rexach cannot be read as authorizing an imposition, not only illegal,

but null, and against the legislative expression. We respectfully submit that the interpretation given by the Supreme Court to the fact that Legislature approved a law in 1992 to authorize that collection is not the most pointed. The Supreme Court declared that the legislative intention was to "authorize that double taxation". No one alleges that double taxation is illegal per se, because it is not. In fact, Las Piedras sets forth as much on the matter. What cannot be done is to levy and collect a double taxation without being expressly authorized by law to do so. This is, it is not the double taxation but the levying and collection without legal power to do so which is unconstitutional. The legislative intention, as we have shown, was not to ratify the illegal imposition and collection, but to declare that from 1992 forward it would authorize the collection, therefore, the expression by the Supreme Court must be clarified that the Legislative Branch legislated to authorize this double taxation from 1992 onward, and not before. This can be seen with pristine clarity from the legislative history of that act. The criteria set forth in Rexach -economic impact, and others- apply to Rexach and to the facts peculiar to that case, were it was unfair to allow a double recoupment of the monies by that entity, that is, from the owner of the project and again from the Municipality.

"Nobody doubts that double taxation in itself is constitutional, for as J. Holmes said in Ft. Smith Lumber Co. v. Arkansas, 251 US 532 (1920), double taxation is the same as increasing the amount of the tax. See, to the same effect, Illinois Cent. R. Co. v. Minnesota, 309 US 157 (1940); Tennessee v. Whitworth, 17 US 129 (1886); Successors of Fantauzzi v. Municipal Assembly, 295 Fed. 803 (C.C.A. 1, 1924); Pons v. Tribunal de Contribuciones, 66 DPR 520; Andreu Aguilar & Co. v. Benitez, Admor., 56 DPR 580, 583 (1940); Sucn Giusti v. Trib. de Contribuciones, 70 DPR 117 (1949), and Ballester Ripoll v. Descartes, 181 F. 2d 823. And as it was said in Tennessee v. Whitworth, supra:

"Double taxation can never be presumed. Justice requires that the governmental burdens, until such exten practicable, fall on everyone equally, and tax once in some way some property, anothr tax in another form may not be imposed, when the buden of both taxes falls on the same person. Some

times tax laws have that effect; but if they do, it is because the legislature has ordred so unequivocally. All pressumptions are against double taxation.

San Miguel & Co. v. Diez de Aquino, Tes. 71 DPR 34, 351 (1950).

In that same sace, the Supreme Court analizes certain arguments that apply tangentially to the present case.

"Finally, the lower court tries to sustain its conclusion with the last "Providing" of Section 99 of the Income Tax Law of Puerto Rico, that states:

> "And, providing, in addition, that when the imposition of a license tax ("patente") conflicts with a tax imposed under the Income Tax Laws and both cannot be made effective, it shall be understood that the tax imposed by the Income Tax Laws shall prevail."

Alleges that in the present case the insular tax and the municipal license tax ("patente") could have been made effective, because the appelant appeled, albeit under protest, the municipal tax; and arguing a conrario sensu, concludes that since he municipal tax could be made effective, it is valid, even if it was in conflict with the Income Tax Laws. That cannot be the significance of that "Providing", because the legality of a tax does not depend on the economic situation of the taxpayer. Since Pueblo v. Irizarry [46 DPR 898 (1934)], this Court, interpreting that same "Providing", said:

> "The intention of the Legislature can be gleaned through these rules. When there is a conflict between a "patente" and a tax, and a possibility that both may not be able to be made effective is assumed, it is clear that it leads from the validity of the "patente" municipal tax, *wre it not in conflict with the insular tax, and, therefore, the Legislature has had to have inmind the double taxation, because in no other way could a conflict exist between both taxes that would cause that both be made effective.*"

For that reason, in Andreu, Aguilar & Co., supra, despite the fact that it was no proved that the plaintiff did not have the means to pay for the municipal tax ("patente"), the suit was allowed simply because the municipal tax ("patente") ordered the payment of similar taxes on the same business already burdened by the P.R. Income Tax Law. Therefore, the phrase "and both cannot be made effective, used in the "Providing" cited, refers to the legal impossibility of coexistence of a tax under the Income Tax Laws, and an excise tax or municipal ("patente") tax which economic impact befalls the same item."

San Miguel & Cia., supra, at pages 353-354. (Emphasis ours.)

The argument seems curious, and pertinent, because the Supreme Court expressed clearly that when the tax is incompatible by the impossibility of coexistence, i.e., an illegal and null tax, there is no payment of a municipal tax by a taxpayer that can be ratified. The basis of the lower court is similar to the case at bar: the lower court insists that, since the tax was paid, it is valid The Supreme Court says in so many words, that it is not. And we can see that since the case of Irizarry, cited, from 1945, as well as in subsequent cases, the Supreme Court has always sustained the norm that what is illegal and null cannot be ratified ever.

G. Alternatives for the treasury

For the rest, it can be argued, and has to be concluded, that at the very least Calzadilla Construction Corporation would have a credit for the amount paid as construction excise tax if it owed any monies to the Municipality of Vega Baja for taxes or "patente" tax. Then in justice, compensation would be mandatory. Remember that the unjust enrichment doctrine applies also to the municipalities Ortiz Andujar v. Estado Libre Asociado 122 DPR 817 (1988) and cases cited therein, due to the fact that, if the construction excise was paid, which has been declared illegal by the Supreme Court as a second collection of the "patente" (municipal license tax), so that the corresponding portion must be applied to any "patente" tax owe, computing the

amount according to tax norms, and refunding the rest to the taxpayer. (10)

As an alternative, without agreeing to it, if the tax is not refunded to the taxpayers who rightfully paid it, to not cause any fiscal inconvenience to the municipalities, at least credit must be granted for the amount paid. The Court must note that in declaring a credit, local economy will be stimulated, because the money cannot be "taken out" of the Municipality, so that the credit would foster more construction or business in that Municipality with the following increment in employment, infrastructure, etc.

VII- CONCLUSION

Lastly, even though other construction companies are not in the same situation, Calzadilla Construction Corp. cannot recuperate this payment in another way, doing business, because it ceased operations in December of 1994. Its claim here responds to its desire to satisfy its creditors and make good with all sectors, even in its present state of economic insolvency. The Municipality's position and the Court of First Instance's decision is an obstacle to that goal. Add to the above that, as we have argued before, the Rexach decision, as it was interpreted by the Court of First Instance, does not overcome any of the constitutional obstacles to a denial of refund. We have discussed amply the various constitutional aspects and there is not one that sustains that the monies collected from Calzadilla Construction cannot be reimbursed. The retroactive imposition of an excise tax deprives the taxpayer of its property without due process of law and constitutes a taking, which is not only illegal and unconstitutional, but unfair, with the taxpayer and its creditors. Pyramid Products v. Tes., 64 DPR 828, 850-851 (1945); PR Tobacco Corp. v. Tes. 62 DPR 811, 820-822 (1944). The judgment of the Court of First Instance in this case fosters and promotes that by means of the denial the fair claims of the non-guaranteed creditors of the taxpayer be frustrated, many of them small business people of the Municipality. When the fair balance of interests is reached, the perspective of the Municipality is not the only important factor. The analysis is much more complex. We believe that the just balance in the

present case is reached following the law and granting the refund to Calzadilla Construction Corporation.

Because of the above, having complied with the legal requirements and followed the proper procedure, the present case is distinguishable from Rexach, therefore a similar decision is not binding. We respectfully request this Honorable Circuit Court of Appeals that the Judgment be revoked and the refund granted. After all, "a judge, in discharging his duties, has no hierarchical superiors than Law and Justice." Asociacion de Residentes de Baldrich, Inc. v. J.P. de P.R., 118 DPR 759 (1987).

WHEREFORE, we very respectfully request this Honorable Court to grant the writ, revoke the decision of the Circuit Court of Appeals, and enter Judgment in favor of the taxpayer, ordering the refund of the construction excise tax paid by it, with interest, expenses, and the costs of the proceeding.

In San Juan, Puerto Rico, this 15th of April, 1998.

NOTICE

CERTIFICATION: On this day I have sent an exact copy of this document to Mr. Jose L. Gandara, Bauza & Davila, Fortaleza #63, Old San Juan, Puerto Rico 000901.

LUZ IVETTE RIVERA
& ASSOCIATES
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(signed Amanda Acevedo Rhodes)
AMANDA ACEVEDO RHODES
Bar Assoc. No. 9288

A-50

96 JTS 158

Rexach Construction Co., Inc.
Appellee

v.

Municipality of Aguadilla
Appellant

No. AC-96-43

Judgment from the Superior Court, Aguadilla Part
Hon. Miguel A. Montalvo Rosario, J.

Appeal from the Circuit Court of Appeal
Regional Circuit IV

Panel integrated by Justices Brau Ramirez, Colon Birriel and Delgado Hernandez

San Juan, Puerto Rico, December 6, 1996.

Cite as 96 JTS 158

Appeal

PER CURIAM

Counsel for the appellant: Gregorio Igartua.
Counsel for the appellee: Rusell A. del Toro & Laura Escalante Facundo (Law Offices of Toro & Santana)

Constitutional Law: Retroactive Effect of Judicial Norms.

Through Opinion *Per Curiam*, the Supreme Court resolves that the norm established in *as Piedras Construction Corp. v. Municipio de Dorado* 94 JTS 3, about nullity of a scheme of impermissible double taxation of a same economic event, only has prospective effect.

NORMATIVE SUMMARY

1. ***Constitutional Law, Penal Law, Prohibition of Ex Post Facto Laws.***
The Constitution expressly forbids retroactivity of penal laws.
2. Temporary Application of Laws, Retroactive Effect of Laws.
In no case shall the retroactive effect of a law cause damage to rights acquired under a previous law.

3. Tax Law, Municipal Excise Taxes ("Patentes"), Construction Excise Tax, Constitutional Law, Double Taxation.
The norm established in ***Las Piedras Construction Corp. v. Municipio de Dorado, 94 JTS 3,*** about nullity of an impermissible scheme of double taxation on a same economic event, only has prospective effect.

4. Constitutional Law, Retroactive or Prospective Effect of the New Jurisprudencial Norm.
There is no constitutional obstacle for a court of last resort, when announcing a new doctrinary norm, to determine if it shall have retroactive or merely prospective effect; it is an exercise of judicial discretion, based on considerations of public policy and social order.

5. Id.
The principal criteria for declaring the retroactiveness or prospectiveness of a judicial determination are: (1) the purpose of the new rule, to determine if its retroactivity would further it, (2) the trust deposited in the previous norm, and (3) the effect of the new rule on the administration of justice. In the last instance, the determination shall be based on considerations of social order, in light of the facts and particular circumstances of each case. In the end, giving the judicial norm only prospective effect is based on an attitude of judicial restraint to avoid violent disruptions in a system structured on the security of the state of jurisprudence.

COMPLETE TEXT OF THE OPINION

In *Las Piedras Construction Corp. v. Municipio de Dorado*, 94 JTS 3, resolved on Jan. 28, 1994, we annulled an excise tax, on the basis that it constituted an impermissible scheme of double taxation on a same economic event. We stated that, until Act. 93 of Nov. 17, 1992 commenced, the Excise Tax Law ("Ley de Patentes") in force since 1974 [1] did not allow it. [2]

Subsequently, various judicial actions were initiated in which movants claimed refund of excise taxes paid to the different municipalities. They questioned whether the decision in *Las Piedras Construction Corp. v. Municipio, supra,* was retroactive. Because of the repetitive character, we agreed to grant and resolve that point. [3]

I

Luan Investment Corp. contracted with Rexach Construction to build a shopping center in the municipality of Aguadilla. As a prior condition to obtain the construction permit, on April 22, 1991, Rexach paid $181,080.00 in excise taxes [4] under Ordinance No. 15, 1977-78.

In 1994, three years after, Rexach requested the refund of the excise tax of April of 1991. The Municipality denied the request on the basis that that he did not question the payment within twenty (20) days after knowing of the municipal administrative determination.

In June of 1994, Rexach sued the Municipality in the Superior Court, Aguadilla Part. The illustrated Court of First Instance (Hon. Miguel A. Montalvo Rosario), ordered the reimbursement. The reputed Circuit Court of Appeals, (Hons. Brau Ramirez, Colon Birriel and Delgado Hernandez), confirmed. The Municipality comes before us. It alleges caducity in Rexach's request for refund and error in applying our jurisprudence retroactively.

II.

In the judicial scope, on more than one occasion we have said, that a decision may have both retroactive and prospective effect. [5] "*There is no constitutional obstacle for a court of last resort, when announcing a new doctrinary norm, selects if same shall be retroactive or prospective.*" *Monclova vs. Financial Credit Corp. 83 D.P.R. 770, 787 n. 15 (1961).* It is an exercise of judicial discretion, based on "*considerations of public policy and social order, because our north must be to 'grant just and equitative remedies that respond to the best social living'*". *Gorbea Valles v. Registrador, 92 JTS 112, res. June 30, 1992.*

As principal criteria for declaring the retroactiveness or prospectiveness of a judicial determination we have recognized: (1) the purpose of the new rule to determine if its retroactivity would further it, (2) the trust deposited in the previous norm; and, (3) the effect of the new rule on the administration of justice.

Nevertheless, in the last instance, the determination shall be based on considerations of social order, in light of the facts and particular circumstances of each case. *Gorbea Valles v. Registrador, supra; Quiles Rodriguez v. Superintendente, 95 JTS 144, res. Nov. 2d, 1995; Pueblo v. Baez Cintron, 102 D.P.R. 30 (1974); Pueblo v. Cruz Jimenez , 99 D.P.R. 565 (1971).* In the end, giving the judicial norm only prospective effect is based on an attitude of judicial restraint "*to avoid violent disruptions in a system structured on the security of the state of jurisprudence..*" *Monclova v. Financial Credit Corp., supra, page 787.*

III

In the case at bar, Rexach pretends to apply our decision of 1994 in *Las Piedras Construction Co. v. Municipio de Dorado, supra,* to a situation occurred in 1991. In light of the criteria expressed it does not follow.

First, in *Las Piedras Construction Co. v. Municipio de Dorado*, supra, we abstained from coffering a retroactive character to the norm. Secondly, a pronouncement to these

effects, would be contrary to the Legislative Branch's intention, that amended the Law in 1992 to allow this double taxation. Thirdly, we have to presume that the cost of the amount claimed was anticipated and included in the budget for the project of Luan and, eventually, charged by Rexach. [6] Fourth, applying the norm retroactively would cause a proliferation of cases and claims and would have a prejudicial effect on the municipal coffers throughout Puerto Rico. Fifth, we do not believe that its retroactive application furthers the purpose that the imposition of a double taxation emanate from a clear and express legislative mandate.

The corresponding revoking judgment will be issued.

JUDGMENT

For the reasons expressed in the Opinion *Per Curiam* that precedes, which is made to form integral part of this one, the decisions of the Circuit Court of Appeals and the Superior Court, Aguadilla Part, and in consequence, denies the petition presented by Rexach Construction Company, Inc. against the Municipality of Aguadilla.

It was pronounced and so ordered by the Court and certified by Mr. General Clerk.

Francisco R. Agrait Llado

General Clerk

ANNOTATIONS 96 JTS 158

1. Act. No. 113, Part 1, sec. 3 of November 14th, 1974.

2. We reiterated this decision in *Nogama Construction Corp. v. Municipio de Aibonito, 94 JTS 73,res. on May 18, 1994.*

3. AC-96-44, *Rexach Construction Company v. Municipio de Manati, 96 JTS 158*, res. on June 21, 1996, negative for lack

of jurisdiction; AC-96-26, *Bird Construction v. Municipio de Naguabo,* res. April 24, 1996, Judgment Rule 54, confirming the decision of the Circuit Court of Appeals that concluded that the action had caducated; and CC-96-58, *Municipality of Guayanilla v. Constructora Lluch,* res. March 21, 1996, Denied. (Associate Justice, Mr. Jaime Fuster Berlingeri would have granted "to regulate").

4. Rexach also complied with the corresponding payment of municipal taxes ("patentes") based on the volume of sales in the municipality.

5. The Constitution expressly prohibits the retroactivity of laws when it states that no *ex post facto laws* shall be approved. Art. II, Sec. 12. Equal protection contains in Art. 3 of the Civil Code, 31 L.P.R.A. Sec.3. In no case can the retroactive effect of the law cause damage to the acquired rights under a previous legislation. See, Vazquez v. Morales, 114 D.P.R. 822 (1983).

6. Ordinarily, it is an expense to be taken into consideration when the tax return is filed.

Commonwealth of Puerto Rico
In the Puerto Rico Supreme Court
San Juan Part

Calzadilla Construction Corporation
Recurring Party
vs.
Vega Baja Municipal, et als
Party recurred against

Case:CC-98-0280 Ori Case: DCD-96-0001 Taxes
Cir Case: Klan-97-0984 Civil Action

Acevedo Rhodes Amanda M.
255 Ponce de Leon Ave.
Office A-270, East Wing, Royal Bank Center
Hato Rey, PR 00917

N O T I C E

In relation with the Petition for Writ of Certiorari, the court has issued the following resolution, which it includes:

Gandara Sanchez Jose L, #63 Fortaleza Street, Old San Juan, San Juan, PR 009

San Juan, Puerto Rico on June 24, 1998

Lic. Isabel Llompart Zeno
Superior Court Clerk

(signed illegibly)

_____
Deputy Clek

A-57

IN THE SUPREME COURT

Calzadilla Construction Corp.
Petitioner

vs. No. CC-98-280 Certiorari

Vega Baja Municipality, et. al.
Party recurred against

RESOLUTION

San Juan, Puerto Rico this July 19, 1998

The Writ for Petition of Certiorari presented in this case is denied.

The Court agreed and the Clerk of the Supreme Court certifies it. Associate Judge Mr. Rebollo Lopez does not participate. Associate Judge Mr. Hernandez Denton did not participate.

(signed illegibly)
Isabel Llompart Zeno
Clerk of the Supreme Court